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In the

Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD, ET AL.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AND PROFESSOR WILLIAM N. ESKRIDGE, JR. AS *AMICI CURIAE* SUPPORTING PETITIONER [PRESIDENTIAL AUTHORITY LACKING – UCMJ]

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TABLE OF CONTENTS

Page

INTEREST OF THE AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Neither Section 821 nor 836 Authorizes the Trial of Hamdan by Military Commission 4

A. No Statute Authorizes Trial of Hamdan by Military Commission 6

B. The Military Commission Convened To Try Hamdan Is Not Authorized by the "Law of War" 7

1. The "Law of War" Consists of the Principles of the Law of Nations That Govern the Conduct of War and the Treatment of Those Affected by War 7

2. At the Time Congress Enacted Article 15 of the Articles of War, the "Law of War" Was Understood To Authorize Military Commissions Only To Meet the Exigencies of the Battlefield or Occupied Territory 10

3. This Court's Second World War Cases Interpreting Article 15 Do Not Support the Commission's Jurisdiction To Try Hamdan 15

4. In Enacting Section 821, Congress Did Not Expand the Law of War To Authorize Military Commissions of the Kind That Would Try Hamdan 19

II. The Adoption and Ratification of the Geneva Conventions of 1949 Preclude Any Construction of Section 821 as Authorization for the Trial of Hamdan by Military Commission 22

1. The Law of War Includes the Geneva Conventions and Thus Precludes Hamdan's Trial by Military Commission 22

2. Section 821 Cannot Be Construed To Violate the Geneva Conventions Absent a Clear Statement of Congressional Intent 25

3. The Geneva Conventions, as Later-Enacted Treaties, Prevail in a Conflict With Section 821 27

III. A Clear Statement Is Required Before Allowing a Trial by Military Commission Violative of Fundamental Concepts of Justice 28

CONCLUSION 30

APPENDIX A-1

1. Uniform Code of Military Justice, art. 21, 10 U.S.C. § 821 (1998) A-1

2. Uniform Code of Military Justice, art. 36, 10 U.S.C. § 836 (1998) A-1

3. Authorization for Use of Military Force, Pub L. No. 107-40, 115 Stat. 224 (2001) A-1

4. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, 2739 (2005) A-3

5. Article 15 of the Articles of War (1916 version), Act of Aug. 29, 1916 § 3, art. 15, Pub. L. No. 64-242, 39 Stat. 619, 653 (1916) A-9

6. Article 15 of the Articles of War (1920 version), Act of June 4, 1920, Pub. L. No. 66-242, 41 Stat. 759, 790 (1920) A-9

7. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ..... A-9

   a. Article 2 ..... A-9
   b. Article 3 ..... A-10
   c. Article 85 ..... A-11
   d. Article 102 ..... A-11
   e. Article 130 ..... A-11

8. War Crimes Act of 1996, 18 U.S.C. § 2441 (2000) A-11

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INTEREST OF THE AMICI[1]

The Brennan Center for Justice at New York University School of Law ("the Center") is a nonpartisan institute dedicated to a vision of effective and inclusive democracy. The Center unites the intellectual resources of the academy with the pragmatic expertise of the bar to assist courts and legislatures to develop practical solutions to difficult problems in areas of special concern to the late Justice William Brennan, Jr.

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[1] Pursuant to Rule 37.6, amici curiae certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici curiae and their counsel, made a monetary contribution to its preparation or submission. Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

This brief urges reversal of the court of appeals' holding that articles 21 and 36 of the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. §§ 821 and 836, authorize the trial of Petitioner Hamdan by a military commission established pursuant to the President's November 13, 2001 order. The court of appeals misinterpreted these provisions.

Section 821 by its terms confers no jurisdiction. It states that the jurisdiction conferred on courts-martial "does not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions . . . ." The provision merely preserves such jurisdiction, if any, to try offenders or offenses by military commission that is conferred by some other statute or by the law of war.

Section 836 only authorizes the President to prescribe procedures for military commissions "consistent with" the UCMJ. It confers no jurisdiction, however, to try Hamdan by military commission if such jurisdiction is not conferred by some statute other than section 821 or the law of war.

The only other statute claimed to authorize these commissions is the Authorization for Use of Military Force ("AUMF"). But nothing in the AUMF refers to military commissions and we adopt petitioner's analysis that the AUMF cannot be construed to confer such jurisdiction.

Hence, under the terms of section 821, the military commission has jurisdiction to try Hamdan only if authorized by reference to the "law of war." The court of appeals

wrongly concluded that the military commission is so authorized.

The term "law of war" has always been understood to refer to that portion of the law of nations that governs the conduct of war and the treatment of combatants and persons affected by war. The language of section 821 was adopted from its predecessor, article 15 of the Articles of War, when the Articles of War were replaced in 1950 by the UCMJ. Article 15 was enacted in 1916 and amended, in respects not relevant here, in 1920. At the time article 15 was enacted, military commissions authorized by the law of war were understood to be tribunals convened by military commanders to meet the exigencies of the battlefield or the need to keep order in occupied territory captured from the enemy. The court of appeals mistakenly read two Second World War era decisions of this Court – *Ex parte Quirin*, 317 U.S. 1 (1942) and *In re Yamashita*, 327 U.S. 1 (1946) – to justify extending the jurisdiction of military commissions to try Hamdan at a prison located on U.S. territory, far from any battlefield, and years after his seizure in Afghanistan and transfer to Guantanamo. In so reading these cases, the court of appeals not only extended *Quirin* beyond its narrowly limited holding, but failed to consider the impact of the 1949 Geneva Conventions, ratified by the United States in 1955, on *Quirin* and *Yamashita* and on the jurisdiction of military commissions under the law of war.

These Conventions – and here, in particular, the Third Geneva Convention – are now the core of the "law of war" and specify the type of tribunals that may pass sentence on persons detained in the course of a war or other armed conflict. The court of appeals failed to recognize that, in determining the commission's jurisdiction, it was obligated to consider not only the Conventions' provisions governing trials of prisoners of war, but Common Article 3 of the

Conventions, which prescribes the jurisdiction of tribunals passing sentence on other persons detained in armed conflicts. In his concurring opinion, Judge Williams showed why the plain language of Common Article 3 and the structure of the treaty compel the conclusion that, contrary to the majority opinion, Hamdan is covered, at least, by Common Article 3.

Moreover, the court of appeals incorrectly concluded that the failure of the military commission to afford judicial safeguards "recognized as indispensable by civilized peoples," as required by Common Article 3, raises merely procedural questions, and does not affect the jurisdiction of the commission. Common Article 3 makes clear that a tribunal not affording these safeguards is not a tribunal that has jurisdiction to pass sentence and hence, lacks jurisdiction under the "law of war."

Finally, the court of appeals ignored well-established canons of construction requiring that a statute not be read to conflict with international law or universally recognized principles of fairness, in the absence of a clear statement that Congress intended the statute to do so. No such clear statement can be found in section 821 or 836 – or in any other statute – authorizing the trial of Hamdan by military commission under procedures that deny the most basic judicial guarantees of a fair trial.

ARGUMENT

I. Neither Section 821 nor 836 Authorizes the Trial of Hamdan by Military Commission

The starting point for interpreting a statute is the language of the statute. *See, e.g., Leocal* v. *Ashcroft*, 543 U.S. 1, 125 S. Ct. 377, 382 (2004). Section 821 provides:

> The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

10 U.S.C. § 821 (1998).

By its own terms, section 821 does not affirmatively provide the President with the power to establish military commissions. It merely makes clear that by conferring jurisdiction on courts-martial, Congress did not deprive military commissions of jurisdiction otherwise established by (1) statute or (2) the law of war. Jurisdiction, therefore, can only be determined by reference to another statute or to another body of law, the "law of war."

Section 836 also confers no jurisdiction. It authorizes the President to prescribe procedures for cases arising under the UCMJ that are triable by military commissions; those procedures "may not be contrary to or inconsistent with [the provisions of the UCMJ]." 10 U.S.C. § 836(a) (1998). This section thus merely authorizes the President to prescribe procedures, within the bounds set by the UCMJ, for such military commissions as may be authorized.

Neither a statute nor the "law of war" confers jurisdiction here.

A. No Statute Authorizes Trial of Hamdan by Military Commission

The court of appeals and the government refer only to a single statute other than sections 821 and 836: the AUMF. *Hamdan* v. *Rumsfeld*, 415 F.3d 33, 37 (D.C. Cir. 2005). The AUMF authorizes the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" of September 11, 2001, or "harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons." Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001). The language of the AUMF makes no reference to military commissions or procedures for trying detainees. Petitioners and other amici demonstrate more fully that the AUMF cannot be read to imply such authority.

Nor can the government argue that the recently-enacted Detainee Treatment Act of 2005, conferring jurisdiction on the D.C. Circuit to review the final decisions of military commissions trying Guantanamo detainees, authorized the President's use of military commissions.[2] No language in this legislation purports to authorize or confer jurisdiction on military commissions. The legislative history makes clear that Congress did *not* confer any such authority on the President. *See, e.g.*, 151 Cong. Rec. S14,258 (daily

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[2] The Detainee Treatment Act of 2005 is title X of Division A of the Department of Defense Appropriations Act, 2006, Pub. L. No. 109-148, 119 Stat. 2680, 2739 (2005), which the President signed into law on December 30, 2005. The Act also is included as title XIV of Division A of the National Defense Authorization Act for Fiscal Year 2006 (H.R. 1815), which passed Congress, but as of January 4, 2006, has not been signed by the President.

ed. Dec. 18, 2005) (statement of Sen. Levin) ("The amendment does not affirmatively authorize either CSRTs or military commissions—instead, it establishes a judicial procedure for determining the constitutionality of such processes."); *id.* at S14,274 (statement of Sen. Durbin) ("Nothing in the legislation affirmatively authorizes, or even recognizes, the legal status of the military commissions at issue in Hamdan. That is the precise question that the Supreme Court will decide in the next months.").[3] Congress took no position on the question whether the President has the authority to convene military commissions.

B. The Military Commission Convened To Try Hamdan Is Not Authorized by the "Law of War"

1. *The "Law of War" Consists of the Principles of the Law of Nations That Govern the Conduct of War and the Treatment of Those Affected by War*—The "law of war" requires reference to the content of this body of international law, as it has evolved to the present.

When section 821 was enacted in 1950, it was understood that the "law of war" incorporated international norms. Testimony before the House confirmed that the "law of war" is a subset of international law and "is set out in

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[3] The conference reports shed no light, *see* H.R. Rep. No. 109-359, at 467 (2005) (H.R. 2863); 151 Cong. Rec. H12,739, H13,112 (daily ed. Dec. 18, 2005) (H.R. 1815), but the weight of legislative history supports this view of the amendment. *See* 151 Cong. Rec. S12,803 (daily ed. Nov. 15, 2005) (statement of Sen. Reid) ("We would hardly authorize these commissions based upon a few hours of floor debate."); *see also id.* at S14,272 (daily ed. Dec. 18, 2005) (statement of Sen. Feingold); *id.* at S14,275 (daily ed. Dec. 18, 2005) (statement of Sen. Reid); *id.* at H12,201 (daily ed. Dec. 18, 2005) (statement of Rep. Skelton).

various treaties like the Geneva convention and [its] supplements."[4] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before the H. Comm. on Armed Servs.*, 81st Cong. 959 (1949) (predecessor bill to H.R. 4080, which was enacted as the UCMJ) (hereinafter "*Hearings on H.R. 2498*"); *see also Quirin*, 317 U.S. at 27-28 (explaining that the reference to the "law of war" in article 15 – the predecessor to section 821 – includes "that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals").

The "law of war" also encompasses developments subsequent to the adoption of section 821. As the Court has recognized, statutes incorporating bodies of law adopt their content as they change over time, and are not frozen at the time the statutes were passed. For example, in *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717 (1988), the Court held that the term "restraint of trade" in the Sherman Act invoked a common law conception that included the term's "dynamic potential" and not merely "the static content that the common law had assigned to the term in 1890." *Id.* at 731-32; *see also Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 729-30 (2004) (holding that the Alien Tort Statute's reference to the "law of nations" was not fixed at the time of its enactment in 1789, but included certain post-enactment developments).

Here, developments in the law of war since the enactment of section 821 – in particular, the 1949 Geneva Conventions ratified by the United States in 1955 – must be

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[4] The testimony as to the meaning of the "law of war" came in reference to article 18, which invested general courts-martial with jurisdiction to punish offenses against the "law of war."

considered in determining the jurisdiction of military commissions under the law of war. The 1949 Conventions are considered part of the law of war today. As Congress recognized when it ratified the Conventions in 1955, the 1949 Geneva Conventions were designed to modernize and bring uniformity to the law of war. *See* S. Exec. Rep. No. 84-9, at 1-2 (1955).[5] Notably, revision of the Courts-Martial Manual in 1951 anticipated that the ratification of the 1949 Geneva Conventions would directly affect military commissions. The official history of the Manual's preparation states that ratification of the 1949 Conventions "will alter to a material extent the procedures heretofore applied by *military commissions*, particularly with respect to the trials of war criminals." Charles L. Decker, *Legal and Legislative Basis: Manual for Courts-Martial United States*, at 2-3 (1951), http://www.loc.gov/rr/frd/Military_Law/pdf/CM-1951.pdf (emphasis added). The provisions were therefore drafted to accommodate the anticipated ratification. *See id.*

Hence, the court of appeals was mistaken in framing the issue as whether the Geneva Conventions create a private right of action or are enforceable by a court. *See* 415 F.3d at 38-42. To interpret section 821 correctly, the court had to

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[5] *See also Hamdi* v. *Rumsfeld*, 542 U.S. 507, 520 (2004) (plurality opinion) (citing the Geneva Conventions for "clearly established principle[s] of the law of war"); H.R. Rep. No. 104-698, at 5 (1996), *as reprinted at* 1996 U.S.C.C.A.N. 2166, 2170 (stating that "the Geneva conventions are considered parts of the law of war"); U.S. Dep't of Army, Reg. 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, § 1-6 (Oct. 1997), *available at* http://www.army.mil/usapa/epubs/pdf/r190_8.pdf ("Army Reg. 190-8") (citing Geneva Conventions as the legal basis for Army guidelines for the treatment of prisoners of war and other detainees).

consider the Geneva Conventions in determining whether the "law of war" authorizes military commissions in these circumstances.

We show in a later section that, by virtue of the 1949 Geneva Conventions, the law of war does not authorize the military commission convened to try Hamdan. *See infra* pp. 22-27. But we first show that, wholly apart from the Geneva Conventions, the "law of war" as referenced in section 821 has never been understood to authorize such a trial.

2. *At the Time Congress Enacted Article 15 of the Articles of War, the "Law of War" Was Understood To Authorize Military Commissions Only To Meet the Exigencies of the Battlefield or Occupied Territory*—The language of section 821 copies almost verbatim article 15 of the Articles of War as enacted in 1916 and amended in 1920.[6] Hence, the history of article 15 is critical to an understanding of section 821.

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[6] As enacted in 1916, article 15 stated:

> Art. 15. Not Exclusive.—The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions, provost courts, or other military tribunals.

Act of Aug. 29, 1916 § 3, art. 15, Pub. L. No. 64-242, 39 Stat. 619, 653 (1916). In 1920 the words "by statute or" were inserted before the words "by the law of war" and the word "lawfully" was removed. *See* Act of June 4, 1920, Pub. L. No. 66-242, 41 Stat. 759, 790 (1920). Section 821 changes the word "triable" to "tried." *See* Act Establishing Uniform Code of Military Justice art. 21, Pub. L. No. 81-506, 64 Stat. 107, 115 (1950) (codified as 10 U.S.C. § 821).

Congress has enacted standing Articles of War as far back as 1775, specifying, among other things, which persons are statutorily subject to military jurisdiction. *See* William Winthrop, *Military Law and Precedents* 21-24 (2d ed. 1895) (reprint 1920). Following a complete revision of the Articles of War in 1806, Congress did not comprehensively revise them again until well into the twentieth century. *See* Letter from Army Judge Advocate General Enoch H. Crowder to Secretary of War Henry L. Stimson (Apr. 12, 1912), *in Comparison of Proposed New Articles of War With The Present Articles of War and Related Statutes* 2 (GPO 1912).

In 1911, recognizing that reform was long overdue, Secretary of War Jacob M. Dickinson directed Enoch H. Crowder, the Judge Advocate General of the Army, to draft updated Articles of War. *See* Letter from Secretary of War Henry L. Stimson to Rep. James Hay (Apr. 19, 1912), *in Comparison of Proposed New Articles of War*, at 1.

Among the proposed Articles, transmitted to Congress in 1912, was article 12, which declared that general courts-martial would have jurisdiction to "try any person subject to military law for any crime or offense made punishable by these articles and any other person who by statute or by the law of war is subject to trial by military tribunals." H.R. 23628, 62d Cong., at 6 (1912). Because the proposed article 12 expanded the jurisdiction of general courts-martial, General Crowder concluded that an article was needed to preserve the jurisdiction of military commissions and other war courts. *See Revision of the Articles of War: Hearing on H.R. 23628 Before the H. Comm. on Military Affairs*, 62d Cong. 29 (1912) (statement of Gen. Crowder). General Crowder testified that because of the expansion of general court-martial jurisdiction, "[t]here will be more instances in the future than in the past when the jurisdiction of courts-martial will overlap that of war courts,

and the question would arise whether Congress having vested jurisdiction by statute the common law of war jurisdiction was not ousted. I wish to make it perfectly plain by [article 15] that in such cases the jurisdiction of the war court is concurrent." *Id.*

Although the House Committee on Military Affairs conducted hearings on the proposed revisions, the Senate Committee declined to do so, and the proposed Articles were not enacted in full. S. Rep. No. 63-229, at 19-20. Congress, in 1913, enacted ten of Crowder's proposed Articles, including article 12, but it did not enact article 15. *See* Act of Mar. 2, 1913, Pub. L. No. 62-401, 37 Stat. 704, 721-23 (1913).

Congress finally enacted comprehensive revisions to the Articles of War in 1916, following all of General Crowder's proposed articles. *See* Act of Aug. 29, 1916, *supra* n.6. General Crowder once again testified that article 15[7] was a saving provision—designed to make clear that the extension of the jurisdiction of the courts-martial to individuals triable by military tribunals did not eliminate the jurisdiction of military commissions or other military tribunals. *Revision of the Articles of War: Hearing on S. 3191 Before S. Subcomm. on Military Affairs*, 64th Cong. (1916) ("*Hearing on S. 3191*") (statement of General Crowder), *reprinted in* S. Rep. No. 64-130, at 40 (1916); As he explained, article 15 "just saves to these war courts [military commissions] the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander *in the field in time of war* will be at

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[7] The text of article 15 changed little during the four-year process of enacting the proposed Articles of War. *Compare* H.R. 23628, 62d Cong., at 7 (1912) *with* article 15, *supra* n.6.

liberty to employ either form of court that happens to be convenient. Both classes of courts have the same procedure." *Id.* (emphasis added); *see generally Madsen* v. *Kinsella*, 343 U.S. 341, 353 & n.20 (1952).[8]

General Crowder illustrated his discussion of military commissions through references to their use in the Mexican and Civil Wars and Reconstruction. In the Mexican War General Winfield Scott used military tribunals on the battlefield and to maintain order in occupied areas captured from the enemy. Military commissions were used in the Civil War in similar ways and subsequently were used in Southern states under military rule to restore order in the turbulent era of Reconstruction.[9]

General Crowder also explained that a "military commission is [a] common-law war court" which had developed "[o]ut of usage and necessity." *Hearing on S. 3191* at 40-41. To characterize military commissions, Crowder expressly relied on the leading authority on military law of the day: William Winthrop's *Military Law and Precedents*. *Id.* at 40. Winthrop opined that, absent express statutory authorization, military commissions were limited to offenses committed "within the field of the command of the convening commander" and "within the theater of war or places where military government or martial law may legally be exercised." Winthrop, *supra*, at 836.

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[8] General Crowder's views on article 15's meaning were deemed "authoritative" in *Madsen*, 343 U.S. at 353.

[9] Winthrop, *Military Law and Precedents*, at 832-33 (Mexican War); *id.* at 833-34 (Civil War and Reconstruction). During the Civil War and Reconstruction, Congress enacted statutes specifically authorizing military commissions.

This limited view of the jurisdiction of military commissions was shared by Attorney General Thomas W. Gregory. In a 1918 opinion, he rejected military jurisdiction over a would-be German spy detained in military custody after entering the United States but before approaching any military installation or gathering intelligence. *See* 31 U.S. Op. Atty. Gen. 356, 364-65 (1918). After stating that *Ex parte Milligan*, 71 U.S. (4 Wall) 2 (1866), precluded trial by military tribunal, Attorney General Gregory stated that even if "there were no Milligan case," the Constitution "plainly" indicated that military commissions "can not constitutionally be granted jurisdiction to try persons charged with acts or offenses committed outside of the field of military operations or territory under martial law or other peculiarly military territory, except members of the military . . . or those immediately attached to the forces such as camp followers." *Id.* at 360-61.

In sum, military commissions were tribunals used by commanders in the field to meet the necessities created by the battlefield or the occupation of enemy territory.

The Supreme Court's decision in the landmark case of *Milligan* confirms this historical understanding. Milligan, an American citizen living in Indiana, was tried and sentenced to death by a military commission for aiding an organization engaged in rebellion against the United States during the Civil War. 71 U.S. (4 Wall) at 107. Milligan was not a member of the armed forces and Indiana was neither a state in rebellion against the United States nor a battlefield in the Civil War *Id.* at 118. Milligan filed a habeas petition, challenging the jurisdiction of the military commission that tried him. *Id.* at 107-08.

Rejecting the jurisdiction of the military commission, the Court held that the "laws and usages of war" did not give

the President the authority to try by military commission a civilian defendant in a place that was not a field of battle, that was far from the exigencies of war, and where the civil courts were open and in operation. *Id.* at 121-22. Rather, military commissions could only be used during a foreign invasion or civil war, where "war really prevails" in "the theatre of active military operations," where "the courts are actually closed, and it is impossible to administer criminal justice according to law," and where there is a "necessity to furnish a substitute for the civil authority." *Id.* at 126-27.

3. *This Court's Second World War Cases Interpreting Article 15 Do Not Support the Commission's Jurisdiction To Try Hamdan*—In the context of the Second World War, during an emotional time for our country, two cases, *Quirin* and *Yamashita*, upheld the jurisdiction of military commissions on grounds that did not seem to meet the historical pattern limiting such commissions to cases arising in the field in time of war or in occupied territory. The court of appeals mistakenly relied on these cases. 415 F.3d at 38. Neither supports jurisdiction here.

Quirin involved eight Nazi saboteurs who were tried and convicted by a military commission for entering the United States during World War II, removing their uniforms, and going behind our lines with the intention of destroying U.S. war facilities.[10] 317 U.S. at 20-23. After the Court denied their challenge to the jurisdiction of the military

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[10] The Nazi saboteurs were also charged with, *inter alia*, violations of articles 81 and 82 of the Articles of War, which prohibited aiding the enemy and spying. 317 U.S. at 23. Those articles were recodified as sections 904 and 906 of the UCMJ, and remain the only two provisions of the UCMJ for which violations are expressly subject to trial by military commission. *See* 10 U.S.C. §§ 904 (aiding the enemy), 906 (spying).

commission, six of the eight saboteurs were executed. The Court's written decision, issued several months after the executions, has been heavily criticized as a *post hoc* rationalization of the executions,[11] and Justice Scalia has noted that "[t]he case was not this Court's finest hour," *Hamdi*, 542 U.S. at 569 (Scalia, J., dissenting).

In any event, *Quirin* does not provide a basis for a trial of Hamdan by military commission. Historians reviewing the papers of the Justices have found that Chief Justice Stone's initial draft opinion suggested that *all* violations of the law of war were triable by military commission. Danelksi, *supra* n.11, at 76. After Justice Black called to the Chief Justice's attention the extraordinary unprecedented consequences of such a holding, the Chief Justice revised the opinion to narrowly limit its scope.[12] *Id.*

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[11] *See* A. Christopher Bryant & Carl Tobias, Quirin *Revisited*, 2003 Wisc. L. Rev. 309, 330-32 (2003); Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Commissions in Historical Perspective*, 38 Cal. W. L. Rev. 433, 471-79 (2002); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259, 1290-91 (2002); Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 Const. Comment. 261, 287 n.94 (2002); David J. Danelski, *The Saboteurs' Case*, 1 J. S. Ct. Hist. 61, 71-80 (1996).

[12] After reviewing the draft, Justice Black wrote to Chief Justice Stone: "While Congress doubtless could declare all violation of the laws of war to be crimes against the United States, . . . I seriously question whether Congress could constitutionally confer jurisdiction to try *all* such violations before military tribunals. In this case I want to go no further than to declare that these particular defendants are subject to the jurisdiction of a military tribunal because of the circumstances and purposes of their entry into this country as part of the enemy's war forces. Such a limitation, it seems to me, would leave the *Milligan* doctrine untouched, but to subject every person in the

His opinion for the Court upholds jurisdiction of the military commission on the grounds expressly limited to the unique facts of the case:

> We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered or after entry remained in our territory without uniform—an offense against the law of war. *We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.*

317 U.S. at 45-46 (emphasis added).

Quirin's narrow holding cannot be stretched to authorize the trial of Hamdan by military commission. In *Quirin*, it was conceded that the saboteurs were enemy combatants—they were soldiers of the German army, against whom the United States had formally declared war. *Id.* at 20-21. Here, there is no declared war against an identifiable enemy state, and Hamdan denies that he is an enemy combatant. Nor is Hamdan charged with "the particular acts"

United States to trial by military tribunals for every violation of every rule of war which has been or may hereafter be adopted between nations among themselves, might go far to destroy the protections declared by the *Milligan* case." Danelski, *supra* n.11, at 76.

charged against the saboteurs – entering the United States and removing their uniforms, with the intention of destroying utilities and war materials – which the *Quirin* Court held were offenses against the law of war that could be tried by military commission. *Id.* at 45-46. The court of appeals did not explain how the conspiracy charged against Hamdan violates the law of war. As another amicus shows, conspiracy is not a violation of the law of war. *See* Brief for Professor George Fletcher as Amicus Curiae Supporting Petitioner, *Hamdan* v. *Rumsfeld*, No. 05-184 (2006).

Moreover, *Quirin* could no longer be authority for a trial of Hamdan by military commission in light of the subsequent 1949 Geneva Conventions and their ratification by the United States in 1955. These Conventions are the core of the relevant law of war, and as discussed below, *see infra* pp. 22-27, deny jurisdiction to tribunals like the military commission convened to try Hamdan, which do not meet the standards specified in the Conventions.

The other Second World War decision, *Yamashita,* involved a Japanese general who was tried and sentenced to death by a military commission on the basis of the doctrine of command responsibility for war crimes committed by his troops. 327 U.S. at 5, 13-15. The Court's decision to uphold the jurisdiction of the commission that tried Yamashita, *id.* at 10, 19-20, also has been severely criticized. In any event, the 1949 Geneva Conventions have deprived that decision, as it applies to the jurisdiction of military commissions, of all vitality. *Yamashita*'s holding that a prisoner of war could be tried by military commission for war crimes committed before capture was specifically repudiated by article 85 of the Third Geneva Convention, which clarifies that prisoners of war are entitled to the protections of the Convention for crimes committed before capture and therefore, are subject to article 102 that assures prisoners of war the same trial

procedures afforded members of the captor's forces. *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 85, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (hereinafter "Third Geneva Convention"). Article 85 was inserted to reverse the "view [that] had been adopted by the Supreme Court of the United States of America." 2 Final Record of the Diplomatic Conference of Geneva of 1949, at 318 (Committee II, 18th mtg.); Int'l Comm. of the Red Cross, *Commentaries to the Convention (III) Relative to the Treatment of Prisoners of War* 413 (1949).

The court of appeals mistakenly read *Quirin* as if it authorized the trial of *all* offenses against the law of war by military commission, ignoring the care Chief Justice Stone took to limit the decision to the specific acts involved there.[13] *See* 415 F.3d at 38. More importantly, the court of appeals misunderstood the crucial significance of the 1949 Geneva Conventions in determining whether the "law of war" authorizes the military commission convened to try Hamdan. *See infra* pp. 22- 27.

4. *In Enacting Section 821, Congress Did Not Expand the Law of War to Authorize Military Commissions of the Kind That Would Try Hamdan*—Following World War II, Congress undertook a comprehensive revision of the Articles of War. A committee, led by Harvard Law School

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[13] Other language in *Quirin* makes clear that it was not intended to have this sweeping effect. *See* 317 U.S. at 29 ("We must therefore first inquire whether any of the acts charged is an offense against the law of war *cognizable before a military tribunal*." (emphasis added)); *id.* at 28 (recognizing "the jurisdiction of military commissions to try persons for offenses *which . . . are cognizable by such tribunals*" (emphasis added)); *id.* ("[M]ilitary tribunals shall have jurisdiction to try offenders or offenses against the law of war *in appropriate cases*." (emphasis added)).

professor Edmund M. Morgan, Jr., spent seven months drafting a proposed code, which the committee submitted to Congress.

Congress recodified article 15 in the UCMJ as section 821, copying the language of article 15 almost verbatim. *See* Act Establishing Uniform Code of Military Justice art. 21, 64 Stat. at 115. The legislative history of section 821 is sparse, but such as there is does not suggest that Congress intended to give an expansive reading to the jurisdiction of military commissions. The Morgan Committee stated only that "[t]he language of AW 15 has been preserved because it has been construed by the Supreme Court. *See Ex parte Quirin*, 317 U.S. 1 (1942)." Edmund M. Morgan, Jr., et al., *Uniform Code of Military Justice: Text, References and Commentary Based on the Report of the Committee on a Uniform Code of Military Justice to the Secretary of Defense* 30-31 (1949), http://www.loc.gov/rr/frd/Military_Law/pdf/Morgan.pdf. The provision was not discussed on the floor of Congress. And the final Senate and House Reports each contain little more than the opaque one-sentence reference from the Morgan Committee Report:

> Article 21. Jurisdiction of courts martial not exclusive. This article preserves existing Army and Air Force law which gives concurrent jurisdiction to military tribunals other than courts martial. The language of AW 15 has been preserved because it has been construed by the Supreme Court (*Ex parte Quirin*, 317 U.S. 1 (1942)).

H.R. Rep. No. 81-491, at 17 (April 28, 1949); S. Rep. No. 81-486, at 13 (June 10, 1949).[14] Neither the Morgan Committee Report nor the Senate or House reports gives any indication of what Congress understood *Quirin* meant. The Morgan Committee Report and the House and Senate reports do not even mention *Yamashita*.[15]

There is no indication in the legislative history that Congress understood *Quirin* to say anything more than it did: namely, that it was limited to the special, conceded facts of that case.[16] An expansive reading of *Quirin* seems

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[14] Section 821 was not discussed in the Senate hearings or in the conference report. The discussion of section 821 in the House subcommittee hearings is little more than a single page of a 1,542 page transcript. 95 Cong. Rec. 5719-20 (1949) (statement of Rep. Vinson). The only relevant mention was when one Representative asked what was meant by military commissions. Felix Larkin, Executive Secretary of the Morgan Committee, replied that "I believe a military commission may be defined as a tribunal which can be set up for the trial of persons who offend against the law of war." *See Hearings on H.R. 2498* at 975-76. This gives no explanation of the circumstances required to establish such a commission and, if read to support jurisdiction for any person who violates the law of war, would conflict with Chief Justice Stone's purpose to narrow the *Quirin* decision.

[15] The record of the Senate Armed Services Committee hearings includes a letter from Senator Pat McCarran citing *Yamashita* for the proposition that a military commission could be appointed by any field commander or by any commander competent to appoint a general court-martial. *See Uniform Code of Military Justice: Hearings Before S. Armed Servs. Comm. Concerning S. 857 and H.R. 4080*, 81st Cong. 106 (1949). Senator McCarran's letter received no discussion and the reference to *Yamashita* concerned an issue not relevant to the arguments here.

[16] Later cases referring to military commissions are inapposite. The Court upheld the military commission in *Madsen* v. *Kinsella* because

inconsistent with the purposes of the recodification outlined by Secretary of Defense James V. Forrestal in a draft entitled *Precept and Terms of Reference, Committee on a Uniform Code of Military Justice* (Aug. 18, 1948), in Professor Morgan's papers on file at the Harvard Law School Library. The draft states that "modernization of the existing system should be undertaken *with a view to protecting the rights of those subject to the code and increasing public confidence in military justice*, without impairing the performance of military functions." *Id.* at 1.

II. The Adoption and Ratification of the Geneva Conventions of 1949 Preclude Any Construction of Section 821 as Authorization for the Trial of Hamdan by Military Commission

1. *The Law of War Includes the Geneva Conventions and Thus Precludes Hamdan's Trial by Military Commission*—By its reference in section 821 to the "law of war," Congress confirmed that the provision's meaning was not frozen in time as of 1950 but includes subsequent developments in international law. *See supra* pp. 7-8.[17] The most significant development since the enactment of section 821 has been the adoption of the four Geneva Conventions in

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it was an occupation court enforcing civil law in occupied Germany after World War II. 343 U.S. at 348, 356. The Court rejected the military commission in *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946), because Congress had not authorized military tribunals to supplant civil courts. *Id.* at 322-24. And in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), the Court simply held that it lacked jurisdiction to hear a habeas challenge by a conceded alien enemy who was never in American territory. *Id.* at 790-91.

[17] *Yamashita* recognized that the term "law of war" in section 821's predecessor, article 15, included the 1929 Geneva Convention ratified many years after article 15 was enacted. 327 U.S. at 15.

1949, and their ratification by the United States in 1955. *See supra* pp. 8-9.

Petitioner and other amici show that Hamdan is covered by the protections of the Geneva Conventions in at least two ways: First, as the district court held, Hamdan must be treated as a prisoner of war under the Third Geneva Convention because a "competent tribunal" has not determined that Hamdan is not entitled to prisoner of war status, and therefore he is entitled to the protections afforded in a court-martial. *Hamdan* v. *Rumsfeld*, 344 F. Supp. 2d 152, 161-62 (D.D.C. 2004) (citing Army Reg. 190-8, which implements article 5 of the Third Geneva Convention). Second, as Judge Williams showed, the language and structure of the Third Convention make clear that Hamdan is covered under Common Article 3 of the Geneva Conventions. 415 F.3d at 44 (Williams, J., concurring). Under Common Article 3, Hamdan is entitled, at a minimum, to be tried by "a regularly constituted court" that affords "all the judicial guarantees which are recognized as indispensable by civilized people." Common Article 3(1)(d).

As petitioner and other amici also show, the military commissions fail, in numerous respects, to afford Hamdan the safeguards guaranteed by the Third Geneva Convention, including the rights to be present at all times at his trial and to confront the witnesses against him. *See, e.g.*, Brief of the Ass'n of the Bar for the City of New York as Amicus Curiae Supporting Petitioner, *Hamdan* v. *Rumsfeld*, No. 05-184 (2006); *see also* Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, Conduct of the Trial, 32 C.F.R. §§ 9.6(b)(3) and 9.6(d)(3) (2005).

The court of appeals majority concluded that Hamdan was not covered by the Geneva Conventions, relying heavily

on the deference it felt was due to the President's construction of treaties. 415 F.3d at 42. But while "[r]espect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty," *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999), the Executive's construction will be rejected when it is contrary to the treaty's plain language or structure, or when it would lead to unreasonable results or contradict well-established practices or understandings of the signatories. *See United States* v. *Stuart*, 489 U.S. 353, 365-66 (1989); *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 259 (1984); *Perkins* v. *Elg*, 307 U.S. 325, 348-49 (1939); *Johnson* v. *Browne*, 205 U.S. 309, 316-22 (1907). As Judge Williams' concurring opinion showed, the President's construction – which would deny a person such as Hamdan any protections under the Conventions – conflicts with the language and structure of the Conventions and the clear purpose of Common Article 3. 415 F.3d at 44. Moreover, the State Department, the executive agency with the greatest expertise concerning the meaning of treaties and international law, disagreed with the President's interpretation and considered it a dangerous break from well-established practices and the understanding of all other signatories to the Conventions.[18] Finally, the construction

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[18] William H. Taft, IV, then Legal Advisor to the State Department, advised the Counsel to the President in January 2002 that a decision to accord persons captured in Afghanistan the protections of the Geneva Conventions would be "consistent with the plain language of the Conventions and the unvaried practice of the United States in introducing its forces into conflict over fifty years. It is consistent with the advice of DOS lawyers and, as far as is known, the position of every other party to the Conventions." Letter from William H. Taft to Counsel to the President (Feb. 2, 2002), *in The Torture Papers* 129 (Karen J. Greenberg & Joshua L. Dratel, eds., 2005). Similarly, Secretary of State Colin L. Powell wrote that deciding to withhold the protections of the Geneva Conventions would "reverse

espoused by the President is not reasonable: it would subject Hamdan to prosecution and punishment for violating the law of war, but would afford him none of its protections.

The court of appeals also concluded that questions of whether the safeguards of Common Article 3 were met by the military commission convened to try Hamdan did not go to jurisdiction, but were merely procedural issues from which the court was required to abstain. 415 F.3d at 42. This distinction misapprehends the import of Common Article 3. The tribunals authorized by Common Article 3 are defined by the judicial safeguards they afford. Under its terms, "the passing of sentences" is prohibited "without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees recognized as indispensable by civilized peoples." Common Article 3(1)(d). Because the military commission convened to try Hamdan fails to afford such safeguards, it cannot claim jurisdiction under the "law of war" as set out in Common Article 3. *See, e.g.*, Brief for the Ass'n of the Bar of the City of New York, *supra*.

2. *Section 821 Cannot Be Construed To Violate the Geneva Conventions Absent a Clear Statement of Congressional Intent*—Section 821 cannot be read to authorize military commissions in conflict with the Geneva Conventions unless supported by a clear statement by Congress that it intended section 821 to violate the law of nations.[19] It is well-established that a law "ought never to be

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over a century of U.S. policy and practice in supporting the Geneva conventions." Memorandum from Colin L. Powell to Counsel to the President (Jan. 26, 2002), *in The Torture Papers* 122, 123.

[19] We do not address the question whether a clear statement by Congress authorizing trial by military commission in these

construed to violate the law of nations if any other possible construction remains." *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *see also* Restatement (Third) of Foreign Relations Law of the United States § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.").

The Court has applied this canon to construe federal statutes so as not to violate international law or U.S. treaty obligations. *See, e.g.*, *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982) (construing labor statute to avoid conflict with international agreement); *Washington* v. *Washington Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . . ."); *Lauritzen* v. *Larsen*, 345 U.S. 571, 578 (1953) (interpreting maritime tort statute to avoid conflict with international law); *Chew Heong* v. *United States*, 112 U.S. 536, 540 (1884) (stating judicial presumption that Congress does not implicitly abrogate treaties).

In enacting section 821, Congress did not provide a clear and unequivocal statement that it intended to override provisions of international law. The opposite is true: The use of the term "law of war" indicates Congress's intent that section 821 be applied consistently with international law and our treaty obligations. More pointedly, in 1996 Congress emphasized its commitment to the 1949 Geneva Conventions by designating as war crimes violations of Common Article 3, as well as "grave breaches" of the 1949 Conventions, including provisions guaranteeing prisoners of war fair trial

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circumstances would be constitutional, and no concession on that point should be implied.

procedures. *See* 18 U.S.C. § 2441(a), (b), (c)(1), and (c)(4) (2000).[20]

3. *The Geneva Conventions, as Later-Enacted Treaties, Prevail in a Conflict With Section 821*—Any construction of section 821 to authorize the military commission involved here conflicts with the requirements of the Geneva Conventions. Because the Geneva Conventions are U.S. treaties that post-date the enactment of section 821, they will prevail over section 821 to the extent of any conflict between the two. Statutes and treaties have equal status under the Constitution, *see* U.S. Const., art. VI, cl. 2; *Chae Chan Ping* v. *United States*, 130 U.S. 581, 600 (1889), and when they conflict, the latest in time will control, *see Cook* v. *United States*, 288 U.S. 102, 118-19 (1933); *Whitney* v. *Robertson*, 124 U.S. 190, 195 (1888) (stating that the "duty of the courts is to construe and give effect to the latest expression of the sovereign will"). The Geneva Conventions were ratified in 1955, five years after Congress enacted section 821. Thus, as the more recent expression of the sovereign will, the Geneva Conventions trump the earlier enactment of section 821 in the event they conflict.[21]

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[20] "Grave breaches" are defined by article 130 of the Third Geneva Convention to include "willfully depriving a prisoner of war of fair and regular trial prescribed in this [Third] Convention." Third Geneva Convention, art. 130.

[21] We recognize that the Court is reluctant in some cases to find repeals by implication. Here, however, the rule favoring later-enacted statutes or treaties is buttressed by (1) Congress's intention that section 821 incorporate post-enactment treaties, (2) the evidence that, at the time section 821 was enacted, military commissions would be affected by the anticipated ratification of the Geneva Conventions, and (3) the absence of a clear statement that Congress intended section 821 to override U.S. treaty obligations.

III. A Clear Statement Is Required Before Allowing a Trial by Military Commission Violative of Fundamental Concepts of Justice

The military commission that would try Hamdan would deny him some of the most basic safeguards accepted as fundamental to a fair trial under international and U.S. law. Article 75 of Protocol 1 to the Geneva Conventions guarantees the right to be present for all stages of trial and the right to present and cross-examine witnesses. Protocol Additional Relating to the Protection of Victims of Int'l Armed Conflicts art. 75 at ¶ 4, June 8, 1977, 1125 U.N. 3., ("Protocol 1"). The United States has not adopted Protocol 1, but it "regard[s] the provisions of Article 75 as an articulation of the safeguards to which all persons in the hands of an enemy are entitled." William H. Taft, IV, *The Law of Armed Conflict After 9/11*, 28 Yale J. Int'l L. 319, 322 (2003); *see also* Int'l Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, 999 U.N.T.S. 171; *Crawford* v. *Washington*, 541 U.S. 36, 48-50 (2004) (discussing historical importance of right to confrontation, including view that right is "founded on natural justice").

A trial of Hamdan by military commission would deny him these fundamental safeguards. Section 821 should not be construed to permit that result, given the absence of a clear statement that Congress so intended. *Brown* v. *United States*, 12 U.S. (8 Cranch) 110, 127-29 (1814) (stating that declaration of war was not a clear congressional statement authorizing President to seize enemy alien property in violation of law of war); *see also Duncan*, 327 U.S. at 324; *Ex parte Endo*, 323 U.S. 283, 300 (1944); Guido Calabresi, *The Supreme Court, 1990 Term—Foreword: Antidiscrimination and Constitutional Accountability (What The Bork-Brennan Debate Ignores)*, 105 Harv. L. Rev. 80, 120 (1991) (noting the principle that "judges should not

attribute to the legislature an intention to impinge on fundamental rights unless the legislature has carefully considered the issue and clearly expressed its intention").

Separation of powers considerations also dictate the need for a clear statement from Congress. The President, in establishing military commissions, is acting in an area expressly allocated to Congress. The Constitution gives Congress the power to define and punish offenses against the law of nations, to make regulations for the armed forces, and to create tribunals inferior to the Supreme Court. U.S. Const., art. I, § 8, cls. 9-10, 14. Congress has acted in each of these areas, for example, enacting the UCMJ, specifying two offenses (spying and aiding the enemy) triable by military commissions, 10 U.S.C. §§ 904 and 906, and making violations of Common Article 3 and other provisions of the Geneva Conventions war crimes, 18 U.S.C. § 2441. In our government of separated powers, finding a reasonable balance between security and liberty, particularly in a time of war, "is not well entrusted to the Executive Branch of Government" given its particular responsibility to maintain security and therefore the great likelihood that it would prize security over liberty. *Hamdi*, 542 U.S. at 545 (Souter, J., concurring in part, dissenting in part, and concurring in judgment). In these circumstances, Congress is best suited to strike that balance through thoughtful deliberation and a "clearly expressed congressional resolution of the competing claims," *id.*, especially where, as here, that resolution can have such profound consequences on individual life and liberty. Congress has not made that clear statement and the trial of Hamdan by military commission should not be permitted to proceed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. Uniform Code of Military Justice, art. 21, 10 U.S.C. § 821 (1998)

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

2. Uniform Code of Military Justice, art. 36, 10 U.S.C. § 836 (1998)

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

3. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)

Joint Resolution To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the "Authorization for Use of Military Force".

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL.--That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or

persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) War Powers Resolution Requirements--

(1) SPECIFIC STATUTORY AUTHORIZATION.--Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS.--Nothing in this resolution supercedes any requirement of the War Powers Resolution.

4. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, 2739 (2005)

Sec. 1005. Procedures for Status Review of Detainees Outside the United States.

(a) Submittal of Procedures for Status Review of Detainees at Guantanamo Bay, Cuba, and in Afghanistan and Iraq-

(1) IN GENERAL- Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committee on Armed Services and the Committee on the Judiciary of the Senate and the Committee on Armed Services and the Committee on the Judiciary of the House of Representatives a report setting forth--

(A) the procedures of the Combatant Status Review Tribunals and the Administrative Review Boards established by direction of the Secretary of Defense that are in operation at Guantanamo Bay, Cuba, for determining the status of the detainees held at Guantanamo Bay or to provide an annual review to determine the need to continue to detain an alien who is a detainee; and

(B) the procedures in operation in Afghanistan and Iraq for a determination of the status of aliens detained in

the custody or under the physical control of the Department of Defense in those countries.

(2) DESIGNATED CIVILIAN OFFICIAL- The procedures submitted to Congress pursuant to paragraph (1)(A) shall ensure that the official of the Department of Defense who is designated by the President or Secretary of Defense to be the final review authority within the Department of Defense with respect to decisions of any such tribunal or board (referred to as the 'Designated Civilian Official') shall be a civilian officer of the Department of Defense holding an office to which appointments are required by law to be made by the President, by and with the advice and consent of the Senate.

(3) CONSIDERATION OF NEW EVIDENCE- The procedures submitted under paragraph (1)(A) shall provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee.

(b) Consideration of Statements Derived With Coercion-

(1) ASSESSMENT- The procedures submitted to Congress pursuant to subsection (a)(1)(A) shall ensure that a Combatant Status Review Tribunal or Administrative Review Board, or any similar or successor administrative tribunal or board, in making a determination of status or disposition of any detainee under such procedures, shall, to the extent practicable, assess--

(A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and

(B) the probative value (if any) of any such statement.

(2) APPLICABILITY- Paragraph (1) applies with respect to any proceeding beginning on or after the date of the enactment of this Act.

(c) Report on Modification of Procedures- The Secretary of Defense shall submit to the committees specified in subsection (a)(1) a report on any modification of the procedures submitted under subsection (a). Any such report shall be submitted not later than 60 days before the date on which such modification goes into effect.

(d) Annual Report-

(1) REPORT REQUIRED- The Secretary of Defense shall submit to Congress an annual report on the annual review process for aliens in the custody of the Department of Defense outside the United States. Each such report shall be submitted in unclassified form, with a classified annex, if necessary. The report shall be submitted not later than December 31 each year.

(2) ELEMENTS OF REPORT- Each such report shall include the following with respect to the year covered by the report:

(A) The number of detainees whose status was reviewed.

(B) The procedures used at each location.

(e) Judicial Review of Detention of Enemy Combatants-

(1) IN GENERAL- Section 2241 of title 28, United States Code, is amended by adding at the end the following:

"(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider--

(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who--

(A) is currently in military custody; or

(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant."

(2) REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION-

(A) IN GENERAL- Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.

(B) LIMITATION ON CLAIMS- The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien--

(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) SCOPE OF REVIEW- The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of--

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

(D) TERMINATION ON RELEASE FROM CUSTODY- The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the release of such alien from the custody of the Department of Defense.

(3) REVIEW OF FINAL DECISIONS OF MILITARY COMMISSIONS-

(A) IN GENERAL- Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order).

(B) GRANT OF REVIEW- Review under this paragraph--

(i) with respect to a capital case or a case in which the alien was sentenced to a term of imprisonment of 10 years or more, shall be as of right; or

(ii) with respect to any other case, shall be at the discretion of the United States Court of Appeals for the District of Columbia Circuit.

(C) LIMITATION ON APPEALS- The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to an appeal brought by or on behalf of an alien--

(i) who was, at the time of the proceedings pursuant to the military order referred to in subparagraph (A), detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a final decision has been rendered pursuant to such military order.

(D) SCOPE OF REVIEW- The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on an appeal of a final decision with respect to an alien under this paragraph shall be limited to the consideration of--

(i) whether the final decision was consistent with the standards and procedures specified in the military order referred to in subparagraph (A); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.

(4) RESPONDENT- The Secretary of Defense shall be the named respondent in any appeal to the United States Court of Appeals for the District of Columbia Circuit under this subsection.

(f) Construction- Nothing in this section shall be construed to confer any constitutional right on an alien detained as an enemy combatant outside the United States.

(g) United States Defined- For purposes of this section, the term 'United States', when used in a geographic sense, is as defined in section 101(a)(38) of the Immigration and Nationality Act and, in particular, does not include the United States Naval Station, Guantanamo Bay, Cuba.

(h) Effective Date-

(1) IN GENERAL- This section shall take effect on the date of the enactment of this Act.

(2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS- Paragraphs (2) and (3) of subsection (e) shall

apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.

5. Article 15 of the Articles of War (1916 version), Act of Aug. 29, 1916 § 3, art. 15, Pub. L. No. 64-242, 39 Stat. 619, 653 (1916)

Art. 15. Not Exclusive. – The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions, provost courts, or other military tribunals.

6. Article 15 of the Articles of War (1920 version), Act of June 4, 1920, Pub. L. No. 66-242, 41 Stat. 759, 790 (1920)

Art. 15. Jurisdiction Not Exclusive. – The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.

7. Geneva Convention Relative to the Treatment of Prisoners of War, Articles 2, 3, 85, 102, & 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135

Article 2. In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High

Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Article 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Article 85. Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.

Article 102. A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.

Article 130. Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

8. War Crimes Act of 1996, 18 U.S.C. § 2441 (2000)

(a) Offense.--Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances

described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) Circumstances.--The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

(c) Definition.--As used in this section the term 'war crime' means any conduct--

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

(2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

(3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or

(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.